

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Jun 13, 2019

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

v.

MISSION SUPPORT ALLIANCE,
LLC; LOCKHEED MARTIN
SERVICES, INC; LOCKHEED
MARTIN CORPORATION; and
JORGE FRANCISCO ARMIJO,
Frank,

Defendants.

NO: 4:19-CV-5021-RMP

ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANTS'
MOTION FOR JUDICIAL NOTICE

BEFORE THE COURT is a motion by Defendants Lockheed Martin Services, Inc. ("LMSI") and Lockheed Martin Corporation ("LMC") seeking judicial notice, pursuant to Federal Rule of Evidence 201, of LMC's Management Incentive Compensation Program Plans ("MICP Plans") and certain contents in connection with Defendants' Motion to Dismiss. ECF No. 36. In addition, Defendants seek inclusion of the same documents through the doctrine of incorporation by reference.

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1 *Id.* Plaintiff United States did not respond to the motion. Having reviewed the
2 motion, the attached declaration and exhibits, and the relevant law, the Court is fully
3 informed.

4 **BACKGROUND**

5 On February 8, 2019, the United States filed a Complaint against LMSI, LMC,
6 Mission Support Alliance, LLC (“MSA”), and Jorge Francisco “Frank” Armijo
7 (“Armijo”) asserting causes of action under the False Claims Act and the Anti-
8 Kickback Act, as well as common law claims for breach of contract, unjust
9 enrichment, and payment by mistake. ECF No. 1. Defendants LMSI and LMC have
10 moved to dismiss the United States’ claims under the False Claims Act and the Anti-
11 Kickback Act for failure to state a claim under Federal Rule of Civil Procedure
12 12(b)(6). ECF No. 37. MSA and Armijo have filed separate Motions to Dismiss.
13 ECF Nos. 39 and 42. Responses and replies to the three Motions to Dismiss are
14 forthcoming, and the Court is scheduled to hear oral argument from the parties in
15 October 2019.

16 In the instant motion, LMSI and LMC maintain that the MICP plans are
17 relevant because the Anti-Kickback Act claim raised by the United States is premised
18 on incentive compensation that LMC provided through its MICP. *See* ECF No. 36 at
19 2. The Complaint alleges that “LMC used its [MICP] to provide things of value to
20 high-ranking MSA employees . . . for their use of their MSA positions to provide
21 favorable treatment to LMC and LMSI.” ECF No. 1 at 40–41. Although the

1 Complaint refers to the MICP for years 2009 through 2015, no MICP Plans are
2 attached to the Complaint.

3 LMC's MICP Plans for the relevant period, which LMSI and LMC maintain is
4 2009-2016, are public documents that LMC filed with the U.S. Securities and
5 Exchange Commission ("SEC"). *See* ECF No. 36 at 3. LMSI and LMC provide the
6 hyperlinks for accessing the documents through the SEC's Electronic Data
7 Gathering, Analysis, and Retrieval ("EDGAR") system, as well as the actual
8 documents as exhibits to the declaration supporting the motion. ECF Nos. 36 at 3-4;
9 38-1 through 38-8 (Exhibits A through H).

10 In addition to seeking judicial notice and incorporation by reference of the
11 MICP Plans for years 2009 through 2016, LMSI and LMC seek judicial notice of the
12 existence of certain statements in each MICP Plan, including that:

- 13 (1) One purpose of the Plan is to '[e]stablish performance goals within
14 the meaning of Section 162(m) of the Internal Revenue Code.'
15 (2) Participation in the MICP Plan is limited to LMC employees.
16 (3) MICP payments to individual employees are determined using a
17 formula that accounts for individual and organizational performance.

18 ECF No. 36 at 5.

19 LEGAL STANDARDS

20 As a general rule, district courts may not consider material outside the
21 pleadings when assessing the sufficiency of a complaint under Federal Rule of Civil
Procedure 12(b)(6). *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001).

Rather, "when matters outside the pleading are presented to and not excluded by the

1 court,” the court must convert the Rule 12(b)(6) motion into a motion for summary
 2 judgment under Rule 56. Fed. R. Civ. P. 12(d). The two exceptions to this precept
 3 are: (1) judicial notice under Federal Rule of Evidence 201; and (2) the judicially-
 4 created incorporation-by-reference doctrine. *Khoja v. Orexigen Therapeutics, Inc.*,
 5 899 F.3d 988, 998 (9th Cir. 2018), *cert. denied sub nom, Hagan v. Khoja*, 2019 U.S.
 6 LEXIS 3431, 2019 WL 429555 (U.S., May 20, 2019).

7 To qualify for judicial notice, an adjudicative fact must be one “that is not
 8 subject to reasonable dispute because it: (1) is generally known within the trial
 9 court’s jurisdiction; or (2) can be accurately and readily determined from sources
 10 whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b).

11 The incorporation-by-reference doctrine “treats certain documents as though
 12 they are part of the complaint itself.” *Khoja*, 899 F.3d at 1002. A defendant may
 13 seek to incorporate by reference a document if the complaint “refers extensively to
 14 the document or the document forms the basis of the plaintiff’s claim.” *United States*
 15 *v. Ritchie*, 342 F.3d 903, 907 (9th Cir. 2003). The objective of the doctrine is to
 16 prevent plaintiffs from selectively relying on the portions of documents that support
 17 their claims, while omitting portions of the same documents that weaken or
 18 extinguish their claims. *Khoja*, 899 F.3d at 1002.

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DISCUSSION

MICP Plans in Effect from 2009 through 2016

Federal courts routinely take judicial notice of documents filed publicly with the SEC. *See Metzler Inv. GMBH v. Corinthian Colleges, Inc.*, 540 F.3d 1049, 1064 n. 7 (9th Cir. 2008) (SEC filings subject to judicial notice); *Dreiling v. Am. Express Co.*, 458 F.3d 942, 946 n. 2 (9th Cir. 2006) (same). Therefore, without taking judicial notice of the truth of the statements within the documents or their effect, the Court takes notice of the MICP Plan documents themselves, for years 2009, 2010, 2011, 2013, 2014, 2015, and 2016,¹ and will consider the documents in resolving the Motions to Dismiss, ECF Nos. 37, 39, and 42, to determine what statements were made in the documents and how these statements relate to the allegations in the United States' Complaint. Given the Complaint's explicit reference to the MICP Plans for years 2009 through 2015, the MICP Plan documents for years 2010, 2011, 2013, 2014, and 2015, also are appropriate to be incorporated by reference into the record for the Motions to Dismiss.

With respect to particular statements contained within the MICP Plans, the Court takes judicial notice that all of the MICP Plans contain the following assertion:

¹ Defendants did not include the 2012 MICP Plan in the documents submitted for purposes of the instant motion.

1 One objective of the Plan is to ‘[e]stablish performance goals within the
2 meaning of Section 162(m) of the Internal Revenue Code.’

3 ECF Nos. 38-1 at 2; 38-2 at 2; 38-3 at 2; 38-4 at 2; 38-5 at 2; 38-6 at 2; 38-7
4 at 2; and 38-8 at 2.

5 However, the Court declines to take judicial notice of the alleged fact that
6 participation in the MICP Plan is limited to LMC employees. The 2009 MICP Plan
7 B defines an “Employee” as “a person who is employed by the Company and who is
8 paid a salary as distinguished from an hourly wage.” ECF No. 38-2 at 3; *see also*
9 ECF No. 38 at 2 (identifying ECF No. 38-2 as 2009 MICP Plan B). The Plan defines
10 “Company or Corporation” as “Lockheed Martin Corporation and those subsidiaries
11 of which it owns directly or indirectly 50% or more of the voting stock or other
12 equity.” *Id.* The 2009 MICP Plan A, as well as the MICP Plans for 2010, 2011,
13 2013, 2014, 2015, and 2016, also define “Company” as LMC, as well as subsidiaries
14 of which LMC directly or indirectly owns fifty percent or more of the voting stock or
15 other equity. ECF Nos. 38 at 2–3; 38-1 at 3; 38-3 at 3; 38-4 at 3; 38-5 at 5; 38-6 at 3;
16 38-7 at 3; and 38-8 at 3. The Complaint alleges that “MSA was owned by three
17 entities: (1) Lockheed Martin Integrated Technology, a wholly-owned subsidiary of
18 [LMC]; (2) Wackenhut Services, Inc. (Wackenhut); (3) and [sic] Jacobs Engineering
19 Group, Inc. (Jacobs).” ECF No. 1 at 4.

20 The Ninth Circuit has admonished, “[j]ust because the document itself is
21 susceptible to judicial notice does not mean that every assertion of fact within that

document is judicially noticeable for its truth.” *Khoja*, 899 F.3d at 999; *see also Toth v. Grand Trunk R.R.*, 306 F.3d 335, 349 (6th Cir. 2002) (“[J]udicial notice is generally not the appropriate means to establish the legal principles governing the case.”); *Garcia v. California Supreme Court*, 2014 U.S. Dist. LEXIS 7364, 2014 WL 309000, at *1 (N.D. Cal. Jan. 21, 2014) (“A request for judicial notice is not a proper vehicle for legal argument.”). With respect to incorporation by reference, the Ninth Circuit has emphasized that the doctrine must not be used by a defendant as a mechanism to “short-circuit the resolution of a well-pleaded claim.” *Id.* at 1002. The Court does not find that there is a judicially noticeable statement in the MICP Plans that participation in the Plans is limited to LMC employees; nor is that inference readily determinable by a review of the documents. Likewise, the Court finds that any such statement would exceed the scope of the incorporation-by-reference doctrine.

Lastly, the LMSI and LMC Defendants contend that statements within the MICP Plans supporting that MICP payments to individual employees are determined using a formula that accounts for individual and organizational performance are subject to judicial notice and incorporation by reference. *See* ECF No. 36 at 5. The Court declines to take judicial notice or incorporate by reference this proposition for the same reasons previously set forth. The Court already admitted the MICP Plan documents by judicial notice and through the incorporation-by-reference doctrine. The Court declines to recognize this particular proposition as verified, as that ruling

1 would serve only to facilitate an inappropriate shortcut at this phase in the case. *See*
2 *Khoja*, 899 F.3d at 1003 (“ . . . what inferences a court may draw from an
3 incorporated document should also be approached with caution. . . . it is improper to
4 assume the truth of an incorporated document if such assumptions only serve to
5 dispute facts stated in a well-pleaded complaint.”).

6 Accordingly, **IT IS HEREBY ORDERED** that Defendants LMSI and LMC’s
7 Motion for Judicial Notice in Support of Defendants’ Motions to Dismiss, **ECF No.**
8 **36**, is **GRANTED IN PART** and **DENIED IN PART** as outlined above.

9 The District Court Clerk is directed to enter this Order and provide copies to
10 counsel.

11 **DATED** June 13, 2019.

12
13 *s/ Rosanna Malouf Peterson*
14 ROSANNA MALOUF PETERSON
15 United States District Judge
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